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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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| ROGER M. LINDMARK,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>HENRY T. HEUER et al.,<br><br>Defendants and Respondents. | B205788<br><br>(Los Angeles County<br>Super. Ct. No. BC 349616) |

APPEAL from a judgment of the Superior Court of Los Angeles County. James C. Chalfant, Judge. Affirmed.

Glickman & Glickman and Steven C. Glickman for Plaintiff and Appellant.

Prince & Heuer, Sunnie H. Han and Henry T. Heuer, for Defendants and Respondents.

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Roger M. Lindmark appeals judgment in favor of Henry T. Heuer and Prince & Heuer (Heuer) after a bench trial on Lindmark's complaint to recover a disputed referral fee from Heuer arising out of class action against American Express where Lindmark acted as class plaintiff. Lindmark principally contends the trial court erred in finding that the referral agreements were illegal and in applying the unclean hands defense to his claims. We affirm.

## FACTUAL BACKGROUND AND PROCEDURAL HISTORY

*1. The Class Action and the Referral Fee.*

In 1999, Lindmark, who is an attorney, purchased a desktop copier using his American Express card. A week later he returned the copier and received a full credit posted to his account. However, American Express applied the credit against a transfer balance bearing zero percent interest, rather than against Lindmark's purchase balance which had a higher interest rate. American Express refused to adjust the balance.

Lindmark believed American Express's practice would form the basis of a class action, did research into law firms that handled class actions, and found the firm of Milberg, Weiss, which had gained notoriety prosecuting class actions on behalf of consumers. In January 2000 he contacted the firm to see if the Milberg firm was interested in taking the case, and over the next several months he exchanged emails with the firm.

On July 28, 2000, Lindmark met with Dennis Stewart and Drew Hutton, partners at Milberg. Stewart told him that the firm liked the case, and wanted to move forward. Lindmark and Stewart disagree over the nature of their discussions concerning Lindmark's referral fee. Stewart told Lindmark that Lindmark could receive a court-approved incentive fee and his distribution as a member of the proposed class. Stewart did not suggest that Lindmark could receive a referral fee. Stewart believed any such fee would constitute a conflict of interest and therefore Lindmark could not share in the attorneys' fees. Lindmark contends he asked for a referral fee, and they agreed on a fee of 20 percent. Lindmark told them he wanted the arrangement in writing. Stewart told him that if Lindmark wanted it in writing, he needed to get a "trusted" friend to act as the referring lawyer, and the matter

could be written up as a formal Rule 2-200[1] agreement. Under the referral arrangement, Milberg would pay Lindmark's friend, who would turn over the money to Lindmark.

On August 2, 2000, Lindmark signed a retainer agreement with the Milberg firm. The agreement does not mention the referral fee. Stewart testified the letter constituted the entire agreement of the Milberg firm with Lindmark.

Lindmark asked Henry Heuer to be his trusted friend to act as nominee to receive any referral fee generated by the class action. Lindmark and Heuer had enjoyed a professional relationship, and Heuer agreed to be Lindmark's nominee.[2]

Lindmark and Heuer did not execute a written agreement concerning Heuer's agreement to be Lindmark's nominee. Instead, Lindmark gave Heuer's name to the Milberg firm and Milberg sent a referral fee letter to Heuer; the final agreement was signed on September 14, 2000. Lindmark told Heuer the letter was incorrect because there was no consent by the client as required by Rule 2-200. Lindmark prepared a revised referral fee agreement and sent it to Heuer. Heuer prepared a revised letter on his own letterhead to be sent to Milberg incorporating most of Lindmark's suggested language. The final letter, dated September 14, 2000, was signed by Lindmark, Heuer, and Stewart.

According to Lindmark, Heuer did not have anything to do with the referral of the class action lawsuit to Milberg. According to Heuer, he referred Lindmark to Milberg, and the 20 percent fee payable to him was for that referral. Heuer denied the existence of an oral agreement, and Heuer did not know Lindmark was claiming any of the fee until Lindmark's February 10, 2004 letter. At the time, Heuer had what he termed an "erroneous belief" that he had an attorney-client relationship with Lindmark, although he was not performing any legal services for Lindmark.

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[1] California State Bar Rules of Professional Conduct, Rule 2-200 provides in relevant part that "(A) A member shall not divide a fee for legal services with a lawyer who is not a partner of, associate of, or shareholder with the member unless: [¶] (1) the client has consented in writing thereto after a full disclosure has been made in writing that a division of fees will be made and the terms of such division."

[2] At trial, Heuer denied discussing the referral fee with Lindmark, or that he agreed to be Lindmark's nominee.

Lindmark served as the class representative for the class action, filed in federal court on August 15, 2000. Lindmark's deposition was taken in the class action on December 19, 2000. He was asked what he expected to receive in the case, to which he responded "Justice for Americans." Lindmark was not being totally serious, because although he wanted to benefit the public, that was not all he expected to receive from the class action. No one ever asked if he was getting a referral fee.

In May 2001, the class action went to mediation. Joy Bull, a partner at Milberg, was brought in to work on the class settlement. The class action was settled with a $30.5 million fund for class claimants, $5.15 million for Milberg in attorneys' fees, and a $500,000 charitable contribution. Lindmark did not have any input into the class settlement, although he participated in the formation of a cy pres (charitable) trust, with a donation to go to St. John's University. He received $10,000 for serving as class representative. The final judgment ultimately allocated total attorneys' fees of $5,677,345.89 to Milberg; 20 percent of that amount, $1,107,085.24, was earmarked for Heuer. On March 25, 2002, at the time of the settlement, Lindmark discussed with Milberg attorneys the possibility of having Heuer assign the referral fee to him. The attorneys responded that would not be possible because of the Rule 2-200 letter agreement. None of the papers filed with the court mentioned Lindmark's referral arrangement with Milberg.

At the April 23, 2003 hearing on the settlement, an objector, Ed Cochran, appeared at the hearing. Lindmark wanted Bull to object to Cochran's participation because he believed it could result in a delay in the payout of the settlement funds.[3] Bull did not know anything about Lindmark's referral fee, and told him she would look into it. On July 17, 2003, Bull wrote to Lindmark to advise him that the referral fee was payable to no one other than to Heuer's firm, Prince & Heuer.

Lindmark learned that Milberg had sent a check to Heuer in March 2004 when Heuer advised him of its receipt and suggested they get together to discuss it. According to

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[3] Cochran settled with the class in September 2003. Out of the $500,000 set aside from the cy pres charitable trust, $125,000 went to Kent State. Ultimately, only $50,000 went to St. John's, which was Lindmark's chosen recipient.

Lindmark, Heuer wanted to determine whether he could give Lindmark an IRS form 1099 for the funds, and whether anything in the federal rules prohibited the payout of a referral to the class representative. Lindmark obtained a tax opinion letter concluding that it was proper for Heuer to give him a 1099.

Heuer disputed Lindmark's version of events, claiming that when he received a letter from Lindmark dated February 10, 2004, which discussed the imminent payout of the referral fee, it was the first time he learned of Lindmark's claim. Because of that claim, Heuer called Lindmark to discuss the check after he had received it and deposited it into his trust account. Heuer believed that he had referred Lindmark to Milberg and that the fee was due to Heuer for the referral. Heuer wanted to research the ethical and legal propriety of giving Lindmark a portion of the referral, but asserted that they had no prior arrangement concerning disposition of the funds. Heuer found the arrangement to be a "basic conflict of interest." He was also concerned about the tax consequences. Heuer concluded that Lindmark was "grasping at straws" to find a way around "what was obvious to everyone, that he should not be sharing any of the attorneys'' fees."

Lindmark met with Heuer on March 28, 2004 to discuss the tax opinion letter. According to Lindmark, it was the first time Heuer's partner Sunnie Han raised a question concerning the propriety of Lindmark receiving a referral fee. However, Heuer told Lindmark he would receive the fee once the two issues (the 1099 and federal rules) were resolved. Heuer also wanted to know what was in it for him.

Lindmark next met with Heuer on May 6, 2004, regarding legal research Lindmark had done on class actions and fees paid to class representatives. Heuer told Lindmark about financial problems he was having, and that he was being audited by the IRS. Heuer assured Lindmark that the funds would remain in his trust account. In May 2004, Lindmark filed a complaint with the State Bar regarding Heuer's failure to promptly pay client funds held in trust.

On September 15, 2004, Lindmark wrote to Heuer to inquire about the funds because he had not heard anything from him. In January 2005, Heuer filed an interpleader complaint

in state court. Lindmark was never served with the lawsuit, and the matter was dismissed for lack of prosecution. Heuer paid $550,000 in taxes on the referral fee.

In June 2005, the first federal indictment against the Milberg firm was handed down. Lindmark first became aware of the criminal investigation against Milberg in June or July 2005. On July 9, 2007, Milberg partner David J. Bershad pled guilty to conspiracy to obstruct justice, and agreed to forfeit $7 million.

*2. Lindmark's Action Against Heuer to Recover the Referral Fee.*

Lindmark filed his complaint to recover the referral fee on March 27, 2006. The operative first amended complaint stated claims for conversion, breach of oral contract, breach of fiduciary duty, intentional misrepresentation, concealment, false promise, and constructive trust. In January 2007, Heuer withdrew the funds from the trust account.

On March 27, 2007, Heuer brought a motion for judgment on the pleadings. The trial court stayed the action and required Heuer apply to the District Court, which had retained jurisdiction in the class action over attorneys' fees. On July 19, 2007, the District Court issued its order denying Heuer's motion seeking an order disallowing Lindmark's claim for fees and leave to file a complaint in intervention for declaratory relief. The court found its retained jurisdiction did not cover the parties' "private dispute" at issue in the state court action.

At trial, Lindmark argued the fee agreement was not illegal. He contended that, at the time Milberg made the referral fee agreement with him, an attorney who did not represent the class could act as a class representative in a case that was not a common fund case. (*Phillips v. Joint Legislative Committee* (5th Cir. 1981) 637 F.2d 1014, 1023-1024.) Because the fund in this case was not reduced by the payment of attorneys' fees or expenses, his referral fee was proper. On that basis Lindmark distinguished *Apple Computer, Inc. v Superior Court* (2005) 126 Cal.App.4th 1253, which repudiated *Phillips,* found it limited to its facts, and held an attorney could not serve as class representative and counsel even if the case was not a common fund case because even if fees were paid directly to the attorneys, such fees were an aspect of the class's recovery and the inherent conflict persisted. (*Id.* at pp. 1271-1273.) Lindmark argued that at the time the American Express action settled,

California law did not preclude him from serving as both class representative and class counsel. (*Saxer v. Philip Morris, Inc.* (1975) 54 Cal.App.3d 7, 18, fn. 1.)

Heuer contended that Lindmark's claims were barred because the alleged kickback arrangement was illegal; Lindmark could not serve as class representative and attorney at the same time; and Lindmark had unclean hands because he denied the agreement before the District Court. Lindmark responded to Heuer's unclean hands defense by asserting that any misconduct by Lindmark was connected solely to the Milberg referral fee and did not relate to his transactions with Heuer, who was not prejudiced in any event by Lindmark's unclean hands; Heuer could rely on the doctrine because the parties were not equally at fault because Heuer's conduct was more culpable.

The trial court found for Heuer. The court reasoned that although Lindmark prevailed on his claims, "equity prevents Lindmark from using the court system for recovery" because Heuer had established the affirmative defenses of unclean hands and illegality. In particular, the court found that Lindmark's secret fee agreement with Milberg was illegal and therefore void; it further found that because one of the foundations of the nominee agreement between Lindmark and Heuer was the illegal referral fee from Milberg, that agreement was illegal as well. In discussing unclean hands, the court noted that both parties had unclean hands, and that Heuer was in pari delicto with Lindmark because he refused to pay Lindmark the large referral fee, wanting to keep the money for himself. "Heuer had done nothing to earn the fee. . . . [A]t some point Heuer had no intention of paying Lindmark, and the fee is a total windfall to him. Heuer's hands are also unclean." Nonetheless, because Lindmark, not Heuer, had applied to the court for relief, and the doctrine of unclean hands was designed to protect the court's integrity, the court found for Heuer. The court concluded that it would have preferred to award the money at issue to the class members, but because only these parties, and not the *res*, were before it, it could not do so.

Lindmark moved for a new trial, or in the alternative to vacate the judgment, contending that the court erred in finding the nominee agreement was illegal and that the unclean hands defense barred recovery. Specifically, he argued he was less culpable than Heuer and that an illegal contract could be enforced where the party seeking enforcement

was not as blameworthy as the other party, citing *McIntosh v. Mills* (2004) 121 Cal.App.4th 333 (*McIntosh*).

At the hearing, the court stated that it disagreed that Lindmark was less morally blameworthy than Heuer, and that the contract should be enforced even if it were illegal. "Once I decide the contract is illegal, it's not my job to balance moral blameworthiness. It's probably true, although I do not find Mr. Lindmark is less morally blameworthy than Mr. Heuer. . . . [¶] . . . [¶] I agreed with the fact that the unclean hands [doctrine] did not address the equitable relations between the litigants, that is . . . Mr. Lindmark didn't do anything to Mr. Heuer that constituted the violation of the unclean hands doctrine. . . . I am relying on the fact that I don't think you can come into court having committed misconduct with respect to the very transaction that is at issue and ask the court to enforce the contract." Lindmark pointed out that under *McIntosh*, the illegality defense could not be used to create a windfall and did not apply where, as here, the public could not be protected because the funds could not be returned to the class. The court denied Lindmark's motions.

## DISCUSSION

Lindmark argues that the oral nominee agreement was not illegal because it was independent of the fee sharing agreement between Heuer and Milberg, and that because it resulted in a windfall to Heuer, it should be enforced in Lindmark's favor. He further argues the trial court erred in applying the unclean hands defense, and in finding Lindmark and Heuer did not have an attorney client relationship; finally, he asserts that the trial court had no jurisdiction to adjudicate Lindmark's conflict of interest in the federal class action. We affirm.

### I. STANDARD OF REVIEW.

A trial judge has wide discretion in ruling on a motion for a new trial, and we give great deference to the trial court's discretion. When reviewing an order denying a new trial, we review the entire record to make an independent determination whether the asserted error was prejudicial. (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872; *Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 693-694.)

## II. ALTHOUGH THE ORAL AGREEMENT WAS ILLEGAL, THE TRIAL COURT ERRED IN FAILING TO PROPERLY APPLY THE EXCEPTIONS TO NONENFORCEMENT.

### A. The Oral Nominee Agreement Was Illegal.

The object of a contract must be lawful. (Civ. Code, § 1550, subd. (3).) Section 1595 of the Civil Code defines the object of a contract as "the thing which is agreed, on the part of the party receiving consideration, to do or not to do." A contract is lawful if it is not in conflict with the policy of express law, although it is not expressly prohibited, or it is not contrary to statutes or public policy. (*Vierra v. Workers' Comp. Appeals Board* (2007) 154 Cal.App.4th 1142, 1148; *Kallen v. Delug* (1984) 157 Cal.App.3d 940, 949.) Whether a contract is illegal is a question of law. (*Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531, 540 (*Kashani*).)

In the context of class actions, it is improper for an attorney to act as counsel for the class while at the same time serving as class representative. The rule is based upon the possible conflict of interest that might arise where the potential attorneys' fees far exceed the potential recovery as a class member, giving an attorney who acts as class representative an incentive to settle on terms less favorable to the absent class members. (*Susman v. Lincoln American Corp.* (7th Cir. 1977) 561 F.2d 86, 90-91.)[4] In *Phillips v Joint Legislative Committee, supra,* 637 F.2d 1014, the court permitted dual roles for an attorney because the fees would not come from the common class recovery fund, but directly from the defendant in the class action. (*Id.* at pp. 1023-1024.) *Phillips* did not concern the danger the class representative would be overly generous in the award of fees. "Here the problem does not arise. Any attorney's fee granted in these cases will come directly from the defendants under [a federal statute], and not from any fund created for class relief; hence, [the named plaintiff] would never have an opportunity for overgenerosity." (*Id.* at p. 1024.)

However, in *Apple Computer v. Superior Court, supra,* 126 Cal.App.4th 1253 (*Apple Computer*), a class representative disqualification case, the court held that the rule against

[4] We may look to federal authorities for guidance on matters involving class action procedures. (*Caro v. Procter & Gamble Co.* (1993) 18 Cal.App.4th 644, 656, fn.7; see also *Howard Gunty Profit Sharing Plan v. Superior Court* (2001) 88 Cal.App.4th 572, 580, fn.8.)

dual roles applied in both common fund cases and in cases where the attorneys' fees are paid directly by the defendant. (*Id.* at pp. 1269-1270.) The court noted that although the fee calculation method differed in the two types of cases, the defendant in each case was concerned with the total amount it would be obligated to pay to dispose of the case. (*Id.* at p. 1269.) *Apple Computer* distinguished *Phillips*, noting that it had been limited to its facts and was disapproved by other federal authority;[5] furthermore, the case failed to take into account the fact class actions often settle and the parties reach an agreement regarding attorneys' fees, requiring the court to have the benefit of the unbiased input only an independent class representative could provide. (*Id.* at p. 1272.)[6]

*Apple Computer's* dissection and disavowal of the distinction of the source of the attorneys' fees in determining whether dual representation was appropriate was not, as Lindmark contends, a novel interpretation of the law that did not exist before the *Apple Computer* decision in 2005. Numerous authorities recognized that the size of the class recovery is influenced by and therefore related to the size of the fee even though the fee is paid directly by the defendant and not out of the class recovery because a class defendant is only interested in disposing of the total claims asserted against it, and the allocation between class payment and attorneys' fees is of no consequence to the defendant. (See, e.g., *Lealao v. Beneficial California, Inc.* (2000) 82 Cal.App.4th 19, 34; see also *In re General Motors Corp. Pick-Up Truck Fuel Tank* (3d Cir. 1995) 55 F.3d 768, 820 (*General Motors*).) Indeed,

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[5] See, e.g., *Shroder v. Suburban Coastal Corp.* (11th Cir. 1984) 729 F.2d 1371, 1375-1376 [disapproving and distinguishing Phillips, noting that in determining whether to settle, a class representative who is also class counsel may arrive at answers that benefit counsel rather than the class].)

[6] *Apple Computer* rejected the analysis of *Saxer v. Philip Morris, Inc., supra,* 54 Cal.App.3d 7, upon which Lindmark relies. "[In *Saxer*,] rather cryptically, the court stated in a footnote: 'Defendants contend that Saxer should not be allowed to act as both class representative and as one of the attorneys for the class. This contention lacks merit inasmuch as the court in *Daar*[, *supra*,] 67 Cal.2d 695, 63 Cal.Rptr. 724, 433 P.2d 732[ ] implicitly sanctioned such dual representation.' (*Saxer, supra,* 54 Cal.App.3d at p. 18, fn. 1.) This footnote is the sum total of *Saxer's* analysis--if it can be called that--on the conflict of interest issue. And, as stated, *Daar* says nothing about the propriety of an attorney serving as class counsel and the class representative." (*Apple Computer, supra,* 126 Cal.App.4th at p. 1277.)

*General Motors* took the position that a separate fund for attorneys' fees was in fact a constructive common fund. (*General Motors, supra,* at pp. 819-820.)

These authorities establish that the majority view at the time of the Milberg fee referral agreement was that such an agreement was illegal. (See also Cal. Rules of Professional Conduct, rule 3-300 [prohibiting attorney from acquiring interest adverse to client].) Because the Milberg fee referral agreement was illegal, an agreement regarding its disposition had as its object the improperly obtained referral fee and was also illegal.

**B. Suit on an Illegal Contract.**

Generally, an illegal contract may not serve as the basis for an action, either in law or equity. (*Kashami, supra,* 118 Cal.App.4th at p. 541.) By refusing to entertain the enforcement of illegal contracts, courts maintain their integrity while at the same time deterring the formation of such contracts. (*Yoo v. Jho* (2007) 147 Cal.App.4th 1249, 1255; *Tri-Q, Inc. v. Sta-Hi Corp.* (1965) 63 Cal.2d 199, 218.) "These rules are intended to prevent the guilty party from reaping the benefit of his wrongful conduct, or to protect the public from the future consequences of an illegal contract." (*Tri-Q, Inc. v. Sta-Hi Corp., supra,* at p. 218.)

However, the rule is not an absolute requirement in all cases that "courts will leave the parties to an illegal contract where it finds them." (*Kashani, supra,* 118 Cal.App.4th at p. 541.) An exception to the in pari delicto rule permits courts to enforce an illegal contract where the party seeking enforcement is less morally blameworthy than the other party, and there is no overriding public interest to be served by voiding the agreement. (*McIntosh, supra,* 121 Cal.App.4th at p. 347.) "It is far from correct to say that an illegal bargain is necessarily 'void,' or that the law will grant no remedy and will always leave the parties to such a bargain where it finds them. . . . Before granting or refusing a remedy, the courts have always considered the degree [of] the offense, the extent of public harm that may be involved, and the moral quality of the conduct of the parties in the light of the prevailing mores and standards of the community." (*Homestead Supplies v. Executive Life Ins. Co.* (1978) 81 Cal.App.3d 978, 990.)

The question of relative wrong is one of fact, although it may be one of law where the parties' participation in wrongdoing and suit to enforce the contract constitute an abuse of the civil justice system. (*McIntosh v. Mills, supra*, 121 Cal.App.4th at pp. 351,352.) *McIntosh* denied relief to the participants of an illegal fee sharing agreement between an attorney and a non-attorney, finding the parties were equally blameworthy as a matter of law. (*Id.* at p. 352.) The *McIntosh* court focused on the fact the parties jointly planned a scheme to share in the proceeds of a class action litigation, hid the illegal agreement from both the defendant in the class action and the lawyer's law partners, and the non-lawyer lied in his deposition about the existence of the agreement. Based upon this misconduct and the fact the parties sought to use the civil court system to enforce their illegal agreement, *McIntosh* concluded the parties were in pari delicto as a matter of law. (*Id.* at pp. 351-352.) "[T]he level and degree of [the non-lawyer plaintiff's] own complicity in his admitted pernicious plot of deception to hide the fact that he was a party to a fee-sharing agreement demands a finding of in pari delicto as a matter of law." (*Id.* at p. 352.)

Here, as in *McIntosh*, the parties jointly planned a scheme whereby Lindmark, in the context of a class action involving numerous participants, would receive the fruits of an illegal kickback agreement, launder the funds by engaging Heuer to receive them on his behalf, and refuse to acknowledge the existence of the agreement while under oath in deposition. Heuer, for his part, took advantage of the fruits of the illegal agreement and benefitted from the fact it was illegal by denying its existence to Lindmark when Lindmark sought his referral fee. Under these circumstances, it is appropriate to conclude that the parties are in pari delicto as a matter of law.[7]

[7] Because we conclude that the trial court properly denied enforcement of the illegal agreement between Lindmark and Heuer and its findings and conclusions in that regard are dispositive to this appeal, we do not consider Lindmark's additional arguments.

## DISPOSITION

The judgment of the superior court is affirmed. Each party is to bear its own costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.